Supreme Court, U.S.
FILED
05 192 JUN 22 2005
OFFICE OF THE CLERK

No. 05-

In the
Supreme Court of the United States

Barbara C. Johnson
Petitioner
v.
Board of Bar Overseers of Massachusetts,
M. Ellen Carpenter, Esq.,
in her individual and professional capacities,
including her capacity as
Chair of the Board of Bar Overseers,
Herbert P. Phillips, Esq.,
in his individual and professional capacities,
Office of Bar Counsel,
Daniel Crane, Esq.,
in his individual and professional capacities,
Commonwealth of Massachusetts,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Barbara C. Johnson, Esq., Pro Se
6 Appletree Lane
Andover, MA 01810-4102
978-474-0833
Mass. B.B.O. No. 549972
First Circuit Bar No. 36719

QUESTIONS PRESENTED

1. Whether a federal district court may stay or proceed rather than dismiss on *Younger* grounds a declaratory judgment action of which the result could not affect a parallel state administrative attorney-disciplinary proceeding.

2. Whether a federal district court may stay or proceed rather than dismiss on *Younger* grounds a claim for monetary relief that cannot be redressed in the state proceeding.

3. Whether quasi-judicial and quasi-prosecutorial immunity, regardless of the source, may preempt that article -- article V of the Massachusetts Declaration of Rights -- which guarantees that all magistrates and officers of all three branches of government be accountable to all the people all the time.

4. Whether quasi-judicial and quasi-prosecutorial immunity arising out of a rule of an "affiliated entity" – in this case, the Board of Bar Overseers -- of a state high court is insufficient to preempt article V's guarantee of accountability to Petitioner and dismiss her claims against the Respondents in their individual capacities.

5. Whether the second prong of the Eleventh Amendment, which was never duly ratified and was created by judicial fiat, may not – absent congressional intent -- invoke the Supremacy Clause to both trump article V's guarantee of accountability to Petitioner and dismiss her claims against the Respondents in their official capacities.

6. Whether federal courts may use judicially-created abstention doctrines, about which Congress was silent and formed no intent, to preempt, pursuant to the Supremacy Clause, state statutes, rules, and regulations, and/or state constitutions.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the First Circuit were petitioner Barbara C. Johnson and respondents Board of Bar Overseers of Massachusetts, M. Ellen Carpenter, Esq. (Chair of the Board of Bar Overseers), Herbert P. Phillips, Esq. (Special Hearing Officer), Office of Bar Counsel, Daniel Crane, Esq. (Bar Counsel), and the Commonwealth of Massachusetts.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS	v
BOOKS AND ARTICLES	vii
ADDENDUM	viii

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATUTES INVOLVED	4
RULES	8
STATEMENT OF THE CASE	9
I. The Underlying Attorney Disciplinary Proceeding	9
Count I	10
Count II	10
Count III	11
II. Proceeding in the Massachusetts Supreme Judicial Court	12
III. Proceedings in the U.S. District Court in Boston	12
IV. Proceedings in the First Circuit Court of Appeals	19
REASONS FOR GRANTING THE PETITION	20

I. Review Is Warranted Because Judge-Made Doctrines Have Deprived Petitioner of Her Secured Constitutional Rights 20

II. Review Is Warranted Because Accountability and Liability Are Being Evaded 26

A. By Granting Quasi-Judicial Immunity to Quasi-Judges and Quasi-Prosecutor in Administrative Proceedings Absent Due Process, Equal Protection, and the Application of Evidentiary and Procedural Rules 26

B. By Applying the Eleventh Amendment, a Two-Headed Hydra, to Otherwise Meritorious Claims..... 27

III. Review is Warranted Because the Conflict Between the Judicially-Created Law and the Constitution Must Be Resolved 29

CONCLUSION 30

TABLE OF AUTHORITIES

United States Constitution

Article 3, §1..... 1, 27, 30
Article 6, cl. 2, Supremacy Clause 2, 17, 28
U.S. Const., First Amendment..... 2, 20, 28-29
U.S. Const., Fifth Amendment..... 2, 21
U.S. Const., Eleventh Amendment..... 2, 17-18, 20, 26-30
U.S. Const., Fourteenth Amendment, §1..... 2, 21

28 U.S.C. § 1254(1)..... 1
28 U.S.C. § 1291..... 4
28 U.S.C. § 1294..... 4
28 U.S.C. § 1331..... 4
28 U.S.C. § 1343(a)..... 5
28 U.S.C. § 1347..... 5

28 U.S.C. § 1367(a)..... 5
28 U.S.C. § 1367(c)(3)..... 5
28 U.S.C. § 2201(a)..... 5

42 U.S.C. §1983 ..... 1, 12, 18, 27
42 U.S.C. §1985(3)..... 4, 6, 12, 18
42 U.S.C. §1988(a)..... 7

Massachusetts Constitution

Part the First, Declaration of Rights, art. V..... 21
Part the First, Declaration of Rights, art. VIII.....21, 27
Part the First, Declaration of Rights, art. XI..... 21
Part the First, Declaration of Rights, art. XX..... 21
Part the First, Declaration of Rights, art. XXIX..... 21, 30
Part the First, Declaration of Rights, art. XCVIII..... 21

M.G.L. c. 30A. State Administration Procedures Act ... 8
M.G.L. c. 30A, §11A½. Open meetings 8

Supreme Judicial Court

Rule 3:07 8
Rule 3:07, M. R. Prof. C. 8.3(b) 8, 26
Rule 4:01, §5(3)i 8
Rule 4:01, §§9(1), 9(2), and 9(3) 9
Rule 4:01, §10..... 13

Rules of the Board of Bar Overseers

Rule 1.5 ..... 9, 13

OPINIONS

Allis-Chalmers Corp. v. Lueck
471 U.S. 202 (1985)..... 28

Butz v. Economou
438 U.S. 478 (1978) 17, 24

Cohen v. Hurley
366 U.S. 117 (1961) 21

Commonwealth v. Burgess
426 Mass. 206, 688 N.E.2d 439 (1997) 28

Com. v. College Pro Painters (U.S.) Ltd.
418 Mass. 726, 640 N.E.2d 777 (1994) 29

Commonwealth v. Federico
383 Mass. 485, 419 N.E.2d 1374 (1981) 28

Deakins v. Monaghan
484 U.S. 193 (1988) 19

District of Columbia Court of Appeals v. Feldman
460 U.S. 462 (1983) 16

Dombrowski v. Pfister
380 U.S. 479 (1965) 15

Duvall v. County of Kitsap
260 F.3d 1124 (9th Cir. 2001)
2001.C09.0000732 <http://www.versuslaw.com> 22

English v. General Elec. Co.
496 U.S. 72 (1990)..... 28

Figueroa v. Blackburn
208 F.3d 435 (3d Cir. 2000)
2000.C03.0042063 <http://www.versuslaw.com> 23-25

Forrester v. White
484 U.S. 219 (1988)..... 22

Hans v. Louisiana
134 U.S. 1 (1890) 17,27

Ingersoll-Rand Co. v. McClendon
498 U.S. 133 (1990) 29

Johnson v. Turner,
1997.C06.281 <http://www.versuslaw.com>
No. 94-5919 (6th Cir. 1997) 23

Malone v. White Motor Corp.
435 U.S. 497 (1978)..... 28

Maymí Meléndez v. Álvarez-Ramírez
364 F.3d 27 (1st Cir. (P.R.) 2004)
2004.C01.0000167 <http://www.versuslaw.com> 16

Middlesex County Ethics Committee
457 U.S. 423 [(1982) 15-17

Mireles v. Waco
502 U.S. 9 (1991)..... 22, 26

Morrison v. Lipscomb
877 F.2d 463 (6th Cir. 1989)..... 23

New York Times Co. v. Sullivan
376 U.S. 254 (1964) 26

Rio Grande Community Health Center, Inc. v. Rullan
397 F.3d 56 (1st Cir. 02/14/2005) 15, 17

Roche v. John Hancock Mut. Life Ins. Co.
81 F.3d 249 (1st Cir. 1996)
1996.C01.0000210 <http://www.versuslaw.com> 18

Spevack v. Klein,
385 U.S. 511 (1967) 21

Turner v. Raynes
611 F.2d 92 (5th Cir.) 23

Van Arken v. City of Chicago
103 F.3d 1346 (7th Cir. 1997)
1997.C07.3 <http://www.versuslaw.com> 16

Younger v. Harris
401 U.S. 37 (1971)..... 13-18, 26, 30

BOOKS AND ARTICLES

De Tocqueville, *Democracy in America*
Vol. 1, at 261..... 21

The Federalist, Paper No. 81 28

The Trial of John Peter Zenger
17 Howell's St. Tr. 675 (1735) 26

ADDENDUM

First Circuit Court of Appeals

Judgment, 3/31/05 ..... Add. 1

United States District Court

Judgment, 5/27/04 (Young, C.J.)..... Add. 3
Memorandum and Order, 5/26/04 (Young, C.J.) ... Add. 4
Order, 2/25/04 (Young, C.J.)..... Add. 26
Electronic Clerk's Notes, 2/25/04 (Young, C.J.) ... Add. 28

PETITION FOR A WRIT OF CERTIORARI

Petitioner Barbara Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. In plain contravention of the requirements of the Constitution of the United States, federal law, the Constitution of the Commonwealth of Massachusetts, and state law, the Board of Bar Overseers and Office of Bar Counsel and the natural defendants have embarked on an *ad hoc*, standardless, subjective, arbitrary, and lawless exercise of quasi-judicial and quasi-prosecutorial power, which appears designed to thwart the will of the petitioner (and other members of the Bar similarly situated) as well as the considered judgments of Massachusetts legislative branch.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Add. 1) entered on March 31, 2005, and is unreported. The Memorandum and Order of the district court (Add. 4) is reported at 324 F.Supp.2d 276 (D. Mass. 2004).

JURISDICTION

The judgment of the United States Court of Appeals issued on March 31, 2005. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const., Article 3, §1.

Section 1 of art, 3 reads in pertinent part, "The Judges, both of the supreme and inferior Courts, shall hold their Offices **during good Behaviour**, . . ." *Id.* (emphasis supplied).

U.S. Const., Article 6, cl. 2.

Clause 2 of Article VI reads in pertinent part, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. Const., First Amendment.

The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances."

U.S. Const., Fifth Amendment.

The Fifth Amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

U.S. Const., Ninth Amendment.

The Ninth Amendment provides, in pertinent part: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S. Const., Eleventh Amendment.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

U.S. Const., Fourteenth Amendment, Section 1.

Section 1 of the Fourteenth Amendment reads in pertinent part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Mass. Const. Part the First, Declaration of Rights, art. V.

Article V reads: "All power residing originally in the people, and being derived from them, the magistrates and officers of government, visited with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times **accountable** to them." Id. [emphasis supplied].

Mass. Const., Part the First, Declaration of Rights, art. VIII.

Article VIII reads: "In order **to prevent those, who are vested with authority, from becoming oppressors**, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to . . . " Id. [emphasis supplied].

Mass. Const., Part the First, Declaration of Rights, art. XI.

Article XI reads in pertinent part, "Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. . . . conformably to the laws."

Mass. Const., Part the First, Declaration of Rights, art. XX.

Article XX reads, "The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for."

Mass. Const., Part the First, Declaration of Rights, art. XXIX.

Article XXIX reads, "It is essential to the preservation of the rights of every individual, his life, liberty, property, and

character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their **offices as long as they behave themselves well**; . . ." Id. [emphasis supplied].

Mass. Const., Part the Second, article XCVIII, amending and annulling article 1of Chapter III of Part the Second of the Constitution.

Article XCVIII reads in pertinent part, ". . . All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during **good behavior**, . . . " Id. [emphasis supplied].

STATUTES

18 U.S.C. § 1341. Scheme or artifice to defraud

28 U.S.C. §1291. Final decisions of district courts

28 U.S.C. §1294. Circuits in which decisions reviewable

28 U.S.C. §1295

28 U.S.C. §1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1337. Amount in controversy

28 U.S.C. § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. §1367(a). Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . .

28 U.S.C. §1367(c)(3). Supplemental jurisdiction

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if – (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are

other compelling reasons for declining jurisdiction.

28 U.S.C. §2201(a). Creation of remedy

In a case of actual controversy within its jurisdiction, . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

42 U.S.C. §1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity . . . ."

42 U.S.C. §1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State . . . conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede

him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State . . . conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, . . . ; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State . . . , with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . .

42 U.S.C. §1988(a). Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is

of a criminal nature, in the infliction of punishment on the party found guilty.

M.G.L. c. 30A. State Administrative Procedure. [See BBO Rules 3.2 and 3.39].

Section §11A. Definitions The following terms as used in section eleven A1/2 shall have the following meanings:

. . . "'Governmental body', a state board, committee, special committee, subcommittee or commission, however created or constituted within the executive or legislative branch of the commonwealth or the governing board or body of any authority established by the general court to serve a public purpose in the commonwealth or any part thereof, **but shall not include the general court or the committees or recess commissions thereof, or bodies of the judicial branch, or any meeting of a quasi-judicial board or commission** held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it. . . . [emphasis supplied].

M.G.L. c. 30A, §11A½. Open meetings of governmental bodies

All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section.

No quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as provided by this section. . . .

RULES

Mass. SJC Rule 3:07. Massachusetts Rules of Professional Conduct [Mass. R. Prof. C.]

Mass. SJC Rule 4:01, §5(3)(i)

(3) The Board of Bar Overseers (i) with the approval of this court, may adopt and publish rules of procedure and

other regulations not inconsistent with this rule; . . .

Mass. SJC Rule 4:01, §9(3). Immunity.

(3) The Board, members of the Board and its staff, members of hearing committees, special hearing officers, and the bar counsel and members of his or her staff shall be immune from liability for any conduct in the course of their official duties.

Mass. SJC Rule 4:01, §10

BBO Rule §1.15. Procedure to Apply
BBO Rule 8.3(b). Requiring lawyers to report serious violations of ethical duty by lawyers and judges.

STATEMENT OF THE CASE

I. The Underlying Attorney Disciplinary Proceeding

This case involves a litigator, Barbara C. Johnson, Esq. ["Johnson"], against whom the Massachusetts Office of Bar Counsel ["OBC"] brought disciplinary charges before the Massachusetts Board of Bar Overseers ["BBO"] two months after the November 2002 election, in which she ran for governor on a platform of court reform, the need for judicial accountability, particularly in the family-law court, and the abolishment of judicial and quasi-judicial immunity.

Johnson also maintains a website, falseallegations.com, which has drawn the attention of millions across our nation. For her audience, she publishes fundamental legal "how-to" and "what-is" information, some of her state and federal pleadings, and opinions . . . hers and occasionally some of diverse courts.

The charges brought against her by the OBC primarily concern her website because cenSURing is easier than cenSORing.

Specifically, the OBC brought three charges. In **Count I**, Johnson was charged with publishing allegedly confidential material on her website and thereby harming people, but the OBC never identified with any particularity the confidential material, the offending language, or the specific people allegedly harmed. Due process required identification of the offending language in the petition.

Bar Counsel also alleged that the unidentified information "was derived from confidential reports and records on file in the juvenile . . . or probate courts, and thus impounded or shielded from public view by rule or by statute." No evidence whatsoever was produced evidencing the OBC's claim. The assistant bar counsel ["ABC"] assigned to the case produced only speculative "evidence." Later the ABC **(1)** stated that she did not mean to infer that Johnson published impounded documents from the Juvenile Court, **(2)** admitted that Johnson did not file such documents, but **(3)** complained that those documents were the source of Johnson's information. Of course, the ABC had no proof of that. Johnson never made an appearance in the subject case, which was brought in 1988, and had never been to the subject court.

In **Count II**, the OBC accused Johnson of commingling funds, but the OBC never identified the amount of the funds allegedly commingled. Respondent always contended that she did not commingle funds, for she had already earned the money before she cashed the check. Believing the couple were facing steep attorney's fees to defend against four charges of rape and assault, she thought she was being considerate of them when she deeply discounted her fees and rebated to the couple $3174.50.

The deep discounting made it appear that Johnson had deposited the money into her account before earning it. At least, that was the spin Bar Counsel put on it. But the spin was untrue. Johnson had earned the money, properly put in

into her personal account, extended to the couple sympathy and assistance for which they and their adult, married daughters and sons-in-law appeared to greatly appreciate, returned a few thousand dollars to them so as to ease their upcoming financial burden.

As in Count I, an allegation of publishing "personal and confidential" information was charged in Count II. Petitioner contended that she was given written permission to publish the Complainant's family story and produced the document in which the permission was written. In any case, the complainant had previously published their story to others who had no need to know, and Johnson produced those writings.

Lastly, **Count III** was a charge that arose from a "whistleblower" case brought by Petitioner on behalf of a female geologist over a decade ago. In that case, Johnson was gathering evidence of fraud by the defendant company of the state and federal governments. Petitioner's opponent during "the time of trouble" – between 1995 and 1998 -- was Tyco, a company headed by Dennis Kozlowski.\[1]/ Johnson was found in contempt of a non-existent order. Ironically, a materially altered document was discovered during the Bar proceedings. She had never seen that document. Frankly, neither had the court . . . at least in 1995, when it allegedly was created, and Johnson had considerable documentary evidence to prove her contention. Petitioner scanned in the fabricated document and uploaded it, with full explanation, to her website where it remains today, as well as included it in her legal briefs filed at the BBO.

The OBC alleged that Respondent was jailed in 1998 to force payment of funds allegedly ordered to be paid in 1995 by that non-existent order. Johnson was precluded from the

---

[1] Within a week of this writing, former CEO Kozlowski was found guilty of 30 charges, and will be sentenced in early August.

outset to use that document or any other at trial of that count. The ABC stated during her opening statement that she would establish Count III "largely but not totally . . . by the Chair's ruling on issue preclusion, and by certain admissions by the respondent in her answer."

II. Proceeding in the Massachusetts Supreme Judicial Court

After Johnson learned that the OBC and BBO do not subscribe to fundamental fairness, the cornerstone of due process, and equal protection of the laws, she brought her federal constitutional challenges to the Massachusetts Supreme Judicial Court ["SJC"], where her action was summarily dismissed within 15 minutes of the single justice reading it.[2]

III. Proceedings in the U.S. District Court in Boston

She then filed the "federal version" of that suit in the U.S. District Court in Boston within 35 minutes of the clerk's call telling her of the disposition. The respondents here were the defendants in both the state and federal suits: the BBO, the OBC,[3] the Commonwealth of Massachusetts and various individuals. In both suits, Johnson sought declaratory and injunctive relief as well as money damages for various alleged violations of her civil rights under 42 U.S.C. §§ 1983 and 1985, and for defamation under state law. [Add: 4-5.]

---

[2] *Norwood v. Dickey, et al*, No. 04-3120, slip op. at 4 (8th Cir. 6/1/05) (finding that Norwood had not presented his constitutional claims before either the Arkansas Commission or the Arkansas Supreme Court).

[3] The BBO is the adjudicatory and the OBC, the prosecuting entity. The BBO Rules, promulgated pursuant to SJC Rule 4:01, §5(3)(i), by a Rules Committee, "[m]ade up of three SJC Justices (excluding the Chief Justice)," apply also to the OBC. The salaries of BBO and OBC quasi-governmental persons are paid by private monies collected from attorneys for annual licensing fees.

On February 24th, the District Court dismissed Counts 1 through 6, in which Johnson sought declaratory judgments on *Younger* grounds. \4/

The six counts sought:

(1) a declaratory judgment that a bar disciplinary proceeding is a quasicriminal proceeding and that whether or not the proceeding is quasicriminal, respondents are entitled to a jury trial,

(2) a declaratory judgment that the Rules of the Board of Bar Overseers are unconstitutional both facially and as applied for civil or quasicriminal proceedings,

(3) a declaratory judgment that lawyers are entitled to the full sweep of due process and equal protection of all the laws,

(4) a declaratory judgment that §§ 9(1), 9(2), and 9(3) of Supreme Judicial Court Rule 4:01 are unconstitutional both facially and as applied (there is no scenario in which either the Board Rules or SJC Rule 4:01 §§9(1), 9(2), and 9(3) can be applied constitutionally),

(5) a declaratory judgment that §10 of SJC Rule 4:01 is

---

[4] Caselaw speaks to whether a declaratory judgment could affect or interfere with the result of the disciplinary proceeding. But the conclusions drawn by the courts can be, although logical, only speculative. For instance, in Johnson's disciplinary proceeding, which is still pending, there is no fact that leads one to believe that the decision makers would veer from the predetermined recommendation, namely, of disbarment

What the Court opinions have consistently assumed is that entities like the BBO will relinquish their untamed and untamable power. Untamable, because the OBC and BBO attorneys are private-sector employees. They are paid with the money collected as annual license fees from their brothers and sisters at law. The OBC and BBO are ***not*** agencies and ***not*** departments of any government. They are independent "affiliated entities." *See* <http://www.state.ma.us/courts/courtsandjudges/courts/supremejudicialcourt/about.html#affiliated>. They are not obliged by oath or duty to listen to the United States Supreme Court.

unconstitutional both facially and as applied, and

(6) a declaratory judgment that Rule 1.5 of the Mass. Rules of Professional Conduct is unconstitutional on the grounds that it is too vague and too broad.

Of the six counts, only Count 4, concerning immunity, and Count 6, concerning a rule that applies to fees,\[5]/ have no relevance to the disciplinary proceeding in that they cannot have the practical effect of interfering with that related, but not parallel, litigation pending at the BBO quasi-court. The BBO action may proceed or, at the very least, the declaratory judgment claims may be stayed until the disciplinary action is resolved.

In response to Respondents' motion to dismiss the complaint, Petitioner argued seven issues in writing and/or orally at the hearing on the motion in the district court and in her appellate brief:

1. Johnson challenged each of the three prongs of the *Younger* test, upon which the district court relied to dismiss six counts requesting declaratory judgments and three counts

---

[5] The Special Hearing Officer, Respondent Phillips, wrote in his Hearing Report of 23 May 2005:

> After reviewing the bill and the other evidence presented, I find that Bar Counsel has failed to prove these charges by a preponderance of the evidence. I am not persuaded that the fee charged for the services rendered was **clearly** excessive, \FN26/ nor am I persuaded that the Respondent made intentional misrepresentations to the Parkers about her fees, time and services. In so finding, I note that no testimony was presented in this hearing and thus, I had no opportunity to evaluate the credibility of the Parkers or the Respondent with respect to these issues. (See n.9, supra)
>
> **FN26** In my view, the fact that I might question an hour or two here and there is not sufficient to meet the requirement that a fee be "clearly" excessive.

Hearing Report, except from ¶53.

against the natural defendants in their official capacities, and concluded that the *Younger* abstention doctrine did not apply.

2. She argued that abstention under *Younger v. Harris*, 401 U.S. 37 (1971), was not appropriate because (1) the party seeking relief in the state case differs from the party seeking the relief in the federal case, (2) the issues in the pending local administrative action differ from the issues in the federal case, (3) the relief sought in the federal case differs from the relief sought in the state case,[6] *Rio Grande Community Health Center, Inc. v. Rullan*, 397 F.3d 56, 2005.C01.00000-52 at ¶40 <http://www.versuslaw.com> (1st Cir. 2/14/2005) ("*Younger* applies only when the relief asked of the federal court 'interfere[s]' with the state proceedings"), citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). *Younger* also does not apply (4) when there are exceptional circumstances,[7] or (5) there is bias. See *Brooks v. New Hampshire Supreme Court*, 80 F.3d 633, 640 (1st Cir. 1996).

Because the district court had concluded that she had not satisfied the "bias" exception to the *Younger* abstention doctrine, Johnson, in Issue 2, ran the gauntlet between the two common-law elements of that exception: (1) "general institutional bias" and (2) "the defendants' pecuniary stake in the outcome of the litigation." To demonstrate that she had shown bias, Johnson argued matters that would ordinarily be deemed "taboo" and not in the best taste for an appellate brief.

3. Johnson challenged the validity – i.e., the constitu-

---

[6] "[A]bstention under *Younger v. Harris*, 401 U.S. 37 (1971), and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), was not appropriate because the relief sought in the state case differed from the relief sought in the federal case, inasmuch as retroactive monetary relief was only sought in the state case." *Rio Grande Community* 2005.C01.0000052 at ¶40 <http://www.versuslaw.com>.

[7] *Middlesex* at ¶22, citing *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

tionality -- of the BBO Rules and proved that her reliance on *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), was not misplaced, contrary to the lower court's assertion. To do so required discussion of (a) the inconsistency of the motion judge's conclusions as to the nature of a bar-disciplinary hearing in the Commonwealth, (b) the relief sought by Johnson, and (c) the lower court's misinterpretation of *Maymó-Meléndez v. Álvarez-Ramírez*, 364 F.3d 27 (1st Cir. (P.R.) 2004), and *Van Arken v. City of Chicago*, 103 F.3d 1346 (7th Cir. 1997), as to when Rooker-Feldman is applicable and when it is not.

4. To prove that the *Younger* doctrine does not require abstention on Johnson's claims for declaratory and equitable relief, Johnson (a) discussed the principles of comity, analogizing to cases in the domestic-relations arena, (b) asserted that her money-damage claims for civil rights violations fall within the exception and are thus cognizable in federal court, (c) asserted that constitutional claims do not require a federal court to make a determination of whether an attorney should be disciplined, (d) asserted that the exhaustion of state judicial remedies is not required of her (although she had filed the case in the SJC prior to filing in federal district court), (e) distinguished the instant case from *Middlesex* by showing that the attorney disciplinary proceedings in *Middlesex* were judicial in nature and those in the instant case were administrative in nature. Thus *Younger* is not implicated in the context of this case.

She wrestled with the opposing assistant attorney-general's assertion – with which the District Court and the First Circuit panel concurred -- that *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), to be relevant to this case. He and the courts concluded that *Middlesex* expanded the reach of the *Younger* doctrine to attorney disciplinary hearings. To reach that conclusion, all three entities insisted that such hearings were

judicial in the Massachusetts. But as recently as this year, 2005, the First Circuit wrote in *Rio Grande* at ¶64, "It is unclear exactly how far this second rationale extends."

Petitioner concedes that recent cases rely on *Middlesex* to expand the reach of the *Younger* doctrine, but in this action, the rationale of *Middlesex* is but a smokescreen. It is well-settled that Massachusetts attorney discipline proceedings are administrative in nature, not judicial. And all the Massachusetts cases unequivocally state that they are administrative in the Commonwealth.

The reason is starkly clear. If attorney discipline proceedings were judicial in nature, the OBC and the BBO would have to acknowledge that we have well-settled rules of evidence, rules that they now blithely ignore.

It is those rules which are the safeguards of which the Court in *Butz v. Economou*, 438 U.S. 478, 512-513 (1978), spoke when deciding to extend judicial immunity to hearing officers performing adjudicatory functions in federal administrative agencies: "[F]ederal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process." Id. Not one of those safeguards exists in the Massachusetts OBC/BBO disciplinary proceedings.

5 and 6. Issues 5 and 6 presented the issue of competing constitutions. Johnson showed that article V of the Massachusetts Declaration of Rights is alive and well and that where no United States Congress took part in the birth and development of either the judicially-created second prong of the Eleventh Amendment (from the ribs of *Hans v. Louisiana*, 134 U.S. 1 (1890)) [Issue 5] or the judicially-created doctrine of judicial immunity (from the womb of the Star Chamber) [Issue 6], the federal Supremacy Clause cannot trump art. V's guarantee of accountability since 1780 by all

magistrates and officers of all three branches of government to all the people all the time.

7. Johnson relied on *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249 (1st Cir. 1996). It held that the court has discretion to retain supplemental jurisdiction over the pendent State claim -- even if the federal claims suffer an early demise -- when the discretion is gauged on concern for comity, judicial economy, convenience, fairness, and the like, and that the preferred approach is pragmatic and case-specific.

In sum, the district court made no distinction between judicial and non-judicial acts. It made no distinction between general and limited jurisdiction. It made no distinction between the nature, function, and acts of the diverse respondents. It simply used the words "*Younger*," "judicial immunity" and "quasi-judicial immunity"" as magic wands.

On February 25th, the District Court motion judge held that Johnson's suit for money damages against the individual defendants in their personal capacities stated a cause of action, and invited the parties to submit further briefing on the issues of quasi-judicial and quasi-prosecutorial immunity. Add. 3-4, 2/25/04 Order. Those issues were raised by the judge *sua sponte* in an order after the hearing on the defendants' first motion to dismiss.

In response to the order of the 25th, Johnson filed a brief on the issues of quasi-judicial and quasi-prosecutorial immunity.

Because of the judge's February 25th order, opposing counsel, an assistant attorney-general, then wrote a second motion to dismiss to give the judge something on which the judge could hang his hat. Next, Johnson filed both her opposition to that motion, asserting that neither quasi-judicial nor quasi-prosecutorial immunity was available to the natural defendants, and a motion for reconsideration of the District

Court's February 25th order dismissing her claims for declaratory relief. Reconsideration was denied.

IV. Proceeding in the First Circuit Court of Appeals

Petitioner appealed to the First Circuit from the dismissal of (1) the declaratory-judgment claims "on the basis of the Younger abstention doctrine," (2) the three money-damage claims against the BBO, the OBC, and the named individuals acting in their professional capacities for violations of her civil rights under §§ 1983 and 1985 during the disciplinary process (a) pursuant to their "Eleventh Amendment immunity from suit" and (b) "on the basis of the absolute immunity arising from the defendants' quasi-judicial and quasi-prosecutorial roles in the Board of Bar Overseers and the Office of Bar Counsel" and (3) her common-law defamation claim against Defendant Bar Counsel Daniel Crane ["Crane"] on the grounds that the district court had the discretion to decline to exercise supplemental jurisdiction.

In her appellate brief, Johnson contends that she demonstrated that the district court judge's memorandum contained several critical inconsistencies, resulting in conclusions based on specious facts and making reversal mandatory.

Amongst her many arguments, Johnson argued that a "District Court [is required] to stay rather than dismiss claims that are not cognizable in the parallel state proceeding." *Deakins v. Monaghan*, 484 U.S. 193, 202 (1988) (internal cites omitted). "The Third Circuit rule is sound. It allows a parallel state proceeding to go forward without interference from its federal sibling, while enforcing the duty of federal courts to assume jurisdiction where jurisdiction properly exists." Id. at 202-203.

Opposing the judge's conclusion that Respondents M. Ellen Carpenter ["Carpenter"] and Herbert P. Phillips ["Phillips"] were "performing a traditional adjudicatory function,"

Petitioner argued (1) that Carpenter and Phillips were not officials of an agency but officials of Affiliated Entities, (2) that they did not "perform functions essentially similar to those of judges or prosecutors, in a setting similar to that of a court, (3) that even were we to assume *arguendo* that judicial immunity is constitutional, the factual dispute as to whether Carpenter and Phillips were performing judicial functions was within the purview of a jury to resolve, not within that of the bench when considering a motion to dismiss, and (4) that Carpenter and Phillips did not consider facts or apply law when ruling on motions. Thus, they did not perform traditional adjudicatory functions, making the award of quasijudicial immunity reversible error.

Where Bar Counsel Crane's function was ministerial and where he conspired to and did deprive Johnson of her constitutional rights -- her clearly established First Amendments rights to political expression and free speech, the right to defend herself, as well as her rights to due process and equal protection -- Crane was not entitled to immunity derived from any source or of any kind. In fact, his only function was to play the ***non***prosecutorial role of the titular plaintiff of the petition for discipline. The titular function of plaintiff is not defined in any statute, rule, or regulation. But for §9(3) of SJC Rule 4:01, Crane would not have been immunized for "any conduct" of his.

The First Circuit brevis disposition sloughed off, without mention, Johnson's arguments [Add:1-2], and gave no hint that the panel considered any of Johnson's arguments.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because Judge-Made Doctrines Have Deprived Petitioner of Her Secured Constitutional Rights

A primary question in this case is whether judicially-created doctrines – the Younger doctrine, the doctrine of the "second prong of the Eleventh Amendment," the doctrines of quasi-judicial and quasi-prosecutorial immunity, §9(3) of SJC Rule 4:01 -- can be used to strip Petitioner of her First Amendment rights to petition and to seek redress for her grievances.

These doctrines nullify the plans of the Framers of both the Massachusetts and United States constitutions to assure that these constitutions protect the people from the government, that the public may petition and seek redress, that the laws will not be suspended except as provided in the constitutions, that all magistrates and officers of all three branches of government shall be accountable to the people at all times. U.S. Const. First, Fifth, and Fourteenth Amendments. Mass. Const., Decl. of Rts., arts. V, VIII, XI, XX, XXIX, XCVIII.

By applying these doctrines across the nation in a humungous majority of the cases the public brings against its government or the officers thereof, the courts have rendered meaningless the Framers' plain and express intent to restrict bad behavior.[8]/

Even assuming *arguendo* that the doctrine of judicial immunity may legitimately protect judges, "absolute judicial immunity does not apply to non-judicial acts, i.e., the administrative, legislative, and executive functions that judges may

---

[8] The notion that a violation of the plain language of the Constitution can gain legal stature by long-continued practice is not one I can subscribe to. A majority group, as de Tocqueville observed, too often "claims the right not only of making the laws, but of breaking the laws it has made." De Tocqueville, *Democracy in America*, Vol. 1, at 261.

Cohen v. Hurley, 366 U.S. 117, 142 n.23 (1961) (Mr. Justice Black, with whom Chief Justice Warren and Justice Douglas concurred, dissenting), a 5-to-4 decision overruled in *Spevack v. Klein*, 385 U.S. 511, 514 (1967). "[L]awyers also enjoy first-class citizenship." Id at 516.

on occasion be assigned to perform." *Duvall v. County of Kitsap*, 260 F.3d 1124, 2001.C09.0000732 at ¶29 <http://-www.versuslaw.com> (9th Cir. 2001), citing *Forrester v. White*, 484 U.S. 219, 227 (1988). See also *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991) (per curiam) ("a judge is not immune from liability for non-judicial acts, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction") (citations omitted).

Petitioner contends, however, that absolute judicial immunity may not properly be extended to functionaries employed or appointed to "affiliated entities" – not an agency, department, or division of government, but "affiliated entities" – to oversee administratively those who practice law. At the Massachusetts BBO and OBC, there are no disclosed definitions of duties and no duly enacted rules of evidence apply. Adherence to the procedural rules of the BBO is an act routinely ignored.

In Petitioner's case, the absence of due process was admitted and blatant (one of many examples: no witnesses were to be called in the OBC's case-in-chief, so there would be no opportunity for cross-examination), statutes and common law had no stature, and defenses were improperly precluded.[9]/

---

[9] While this case was pending in the First Circuit Court of Appeals, the Massachusetts Bar Association formed a BBO Task force to put the BBO and the OBC under scrutiny and have issued a report calling for reform. *See* Figures 1(a) and (b), *infra*.

Figure 1(a). Excerpt from Mass. Lawyers Weekly, 10/1/2004

Where the Respondent "affiliated entities" – the BBO and the OBC – and their staff attorneys failed to follow the rules promulgated by committee without statutory authority and deprived Petitioner of her constitutional rights, Respondents were not entitled to the quasi-judicial or quasi-prosecutorial immunity granted them not by a constitution, not by a statute, not by a court order, but by a rule written by an anonymous committee and not duly enacted according to law.

To persons whose acts were administrative in nature and altered Johnson's rights and potential liabilities, judicial immunity was inapplicable. *Johnson v. Turner*, 1997.C06.281 at ¶55, No. 94-5919 <http://www.versuslaw.com> (6th Cir. 1997) ("a judge may be liable for action that is administrative in nature and that does not alter the rights and liabilities of the parties"), citing *Morrison v. Lipscomb*, 877 F.2d 463, 464-466 (6th Cir. 1989). See also *Figueroa v. Blackburn*, 208 F.3d 435, 2000.C03.0042063 at ¶39, <http://www.versuslaw.com> (3d Cir. 2000), citing *Turner v. Raynes*, 611 F.2d 92, 94 (5th Cir.) (opining that the Supreme Court's pronouncements on immunity for judges of courts of inferior or limited jurisdiction have been "circumspect"), *cert. denied*,

---

The president of the Massachusetts Bar Association has appointed a committee to study bar discipline in Massachusetts, to examine the operations and performance of the Office of Bar Counsel, to study the current approaches to bar discipline in Massachusetts and to evaluate what changes, if any, should be made.

Many lawyers agree that this is an area ripe for reform. Despite the best efforts of the Board of Bar Overseers and Bar Counsel officials, oftbaseless disciplinary complaints continue to haunt lawyers, and many question whether the system is set up to provide lawyers with appropriate due process.

The MBA committee should take the time to examine the litany of issues surrounding the bar discipline system, including

Figure 1(b). Excerpt from Mass. Lawyers Weekly, 10/1/2004

449 U.S. 900 (1980).

In *Butz v. Economou*, 438 U.S. 478, 513 (1978) , the Court accorded judicial immunity to hearing officers performing adjudicatory functions within a federal administrative agency; but that conclusion was based on the finding that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." 438 U.S. at 512-13.

In contrast, in the state disciplinary action against Johnson, there was absolutely nothing that was remotely functionally comparable to that of a judge." Id. at 513.

If any court – or in this case, a quasi-court -- knowingly and intentionally acts in such a way that deprives parties of their rights and liabilities without due process, there must be accountability and liability. The keywords are, of course, knowingly and intentionally. Otherwise it would be as held by the court in *Figueroa*:\[10]/ "preposterous." Petitioner is not implying that the actors should be liable for mistakes. A mistake is one thing, an intentional act that the actor knows deprives a party of constitutional rights is another. It is that distinction that appears to be an issue of first impression.

Some noteworthiness of *Figueroa* is found in the irrational typicality of that court's conclusion that a judge does not need to determine whether he or she has jurisdiction prior to exercising jurisdiction. *Figueroa*, at ¶55. "To find otherwise would require a judge to refrain from exercising jurisdiction prior to determining whether jurisdiction, in fact, exists." *Id.* That lack of logic – analogous to concluding that a breach of contract occurred before proving that there was a contract, or concluding that negligence occurred before proving that the alleged tortfeasor had a duty to the complainant –

---

[10] 2000.C03.0042063 at ¶56, <http://www.versuslaw.-com>.

infects the judicial immunity cases. Any excuse in a storm, to avoid having to define and distinguish between "good behavior" and "bad behavior."

Other examples of OBC's bad behavior in the disciplinary action is **(1)** that the charges were never clear, **(2)** that Johnson was never "given an opportunity . . . to dispel any possible misunderstanding" [*Figueroa*, at ¶69 n. 9 (internal cite omitted)], **(3)** that Johnson was told she would be precluded from presenting any exculpatory facts to the court, and **(4)** that at a pretrial hearing, Respondent Special Hearing Officer Phillips repeatedly ordered the transcriptionist not to record when Johnson spoke.\[11]/

Of course, it is well-settled that where the Respondent quasi-judges and quasi-prosecutor were acting in a non-judicial capacity or in excess or outside their jurisdiction; they are not immune from suit seeking monetary damages.

---

[11] On 3 December 2003, approximately a month after this action was served and during Johnson's Opening Statement at the public trial scheduled for that day, Phillips quashed all of Johnson's witness subpoenas and ordered the public out of the hearing room.

If Phillips were to play games again with the reporter, he and the other OBC and BBO staff could fabricate at will. Because Johnson had discovered two fabricated documents during the course of the disciplinary proceedings, and had been precluded from using them as evidence at trial, Phillips' expulsion of the public from the hearing room created, in the vernacular, a remarkable, unanticipated, and memorable spooky situation.

There was no legitimate factual or legal reason for the expulsion of the public. Phillips stated that the real names of certain folks were subject to a protective order. The ABC told him there was not, but he ignored her, too. The desired result had been predetermined and Phillips wanted to be sure that he could reach it without interference and, obviously, embarassment.

Johnson left with the public, and upon learning that the "trial" continued after she left with her contingent and other members of the public, she immediately filed a motion for a new trial, which was denied.

Mireles, 502 U.S. at 11-12. Notwithstanding that well-settled law, the district court wrongly dismissed the claims against the Respondents who acted non-judicially (Respondents Carpenter, Phillips, Crane) and that decision was affirmed by the First Circuit Court of Appeals.

II. Review Is Warranted Because Accountability and Liability Are Being Evaded

A. By Granting Quasi-Judicial Immunity to Quasi-Judges and Quasi-Prosecutor in Administrative Proceedings Absent Due Process, Equal Protection, and the Application of Evidentiary and Procedural Rules

The BBO proceedings (**a**) were administrative, not judicial in nature; (**b**) did not implicate important state interests; (**c**) did not provide an adequate opportunity to raise federal claims, and (**d**) grew out of exceptional circumstances and ire, if not bias, against Johnson fulfilling her duty to report professional misconduct\[12]/ and publishing her work on her Internet website.

> The American Colonists were not willing, nor should we be, to take the risk that '(m)en who injure and oppress the people under their administration (and) provoke them to cry out and complain' will also be empowered to 'make that very complaint the foundation for new oppressions and prosecutions.' The Trial of John Peter Zenger, 17 Howell's St. Tr. 675, 721-722 (1735) (argument of counsel to the jury). To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect 'the obsolete doctrine that the governed must not criticize their governors.'

New York Times Co. v. Sullivan, 376 U.S. 254, 300 (1964)

---

[12] BBO Rule 8.3(b), "requir[ing] lawyers to report serious violations of ethical duty by lawyers and judges." Id. at Comment.

(citations omitted).

B. By Applying the Eleventh Amendment, a Two-Headed Hydra, to Otherwise Meritorious Claims

Another untenable excuse used by the federal courts to allow the judicial or quasi-judicial respondents to escape liability and accountability is the Eleventh Amendment. Like the doctrine of judicial immunity, the nascence of the *second* prong of the Eleventh Amendment was without the potency of any Congress. It was birthed almost 100 years after the duly-ratified first prong of the Eleventh Amendment, which has no application here whatsoever, by a court acting outside the scope of its authority. *Hans v. Louisiana,* 134 U.S. 1 (1890) (enhanced the Eleventh Amendment by judicial fiat holding that a citizen cannot sue his/her own State in federal court). It was a court that when circumventing the legislature by usurping its law-making power, transformed our government into one that oppressed the governed.

This was contrary to what our Framers intended.\[13]/ To prevent such oppression, the Framers gave the public the right to return those oppressing the governed to private life. U.S. Const., Art. 3, §1. Mass. Declaration of Rights, art. VIII. It is reasonable to conclude that the Framers considered that the public would choose from the full spectrum of sanctions: from the giving of relief for one identifiable wrongdoing to the harsh sanction of impeachment. Thus when the district

---

[13] Not having been duly ratified, the second prong of the Eleventh Amendment may not be invoked against Petitioner. Nor may it override or preempt art. V of the Mass. Declaration of Rights, which has since 1780 constitutionally guaranteed accountability at all times by all three branches of government to the people, of which she is one. Nor may it supercede the Fourteenth Amendment, duly ratified 22 years prior to the grenade thrown at the civil rights of individuals in *Hans*. Nor may it override the plain language of §1983, enacted to enforce the provisions of the Fourteenth Amendment. Nor may it overrule the intent of Congress not to afford immunity to those judges who deprive citizens of their civil rights.

court held and the First Circuit affirmed agreed that Eleventh Amendment immunity barred Johnson's §1983 claims against the natural defendants in their official capacities in Counts 7, 8, and 9, they used power that was not theirs to use.

Moreover, where Article V of the Massachusetts Declaration of Rights explicitly guarantees accountability by all magistrates and officers of each branch of government to all the people at all times, and where it does not distinguish between the Commonwealth of Massachusetts or the individuals in their individual or official capacities, article V constitutes the state's express and unequivocal consent to suit by the people. See *The Federalist,* Paper No. 81.

Thus the Eleventh Amendment may neither override the Commonwealth's constitutional guarantee of accountability nor bestow sovereign immunity on the Commonwealth where there was no immunity *ab initio*. Id. Certainly the Eleventh Amendment cannot preempt article V of the Declaration.

Notwithstanding the obvious issue of competing constitutions, Article VI of the federal constitution would have to be invoked, and that is impossible. To invoke Article VI, the intent of the United States Congress to preempt the Massachusetts Declaration of Rights would have to be shown, and where no United States Congress took part in the birth or the development of the Eleventh Amendment, no such intent can be shown and thus the Supremacy Clause may not be invoked. "Whether a Federal law preempts a State law is a question of congressional intent." *Com. v. Burgess*, 426 Mass. 206, 221-222, 688 N.E.2d 439, 450 (1997), citing *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990).

> Under the supremacy clause in art. 6 of the Constitution of the United States, we are obligated to declare invalid any State statute or regulation that purports to regulate a field that Congress has reserved exclusively to itself. *Com. v. Federico*, 383 Mass. 485, 488-489, 419

> N.E.2d 1374 (1981). The touchstone of preemption is congressional intent. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). See *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). "To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

Com. v. College Pro Painters (U.S.) Ltd., 418 Mass. 726, 728, 640 N.E.2d 777, 779 (1994). Certainly if congressional intent is required to preempt a state statute, in the absence of congressional intent, a judge-made "amendment" cannot preempt a constitutional article of the Massachusetts Declaration of Rights.

III. Review is Warranted Because the Conflict Between the Judicially-Created Law and the Constitution Must Be Resolved.

First Amendment and other constitutional interests must trump the respondents' interests in immunity.

By not having an existing statute or a constitutional provision upon which judicial immunity or the second prong of the Eleventh Amendment are based, and no ordinary constitutional analysis -- using strict or intermediate scrutiny or a rational basis test -- of the facts of the case or of Petitioner's legal arguments, the decisions below leave unsettled the critical conflict between the judicially-created law and the exquisite United States and Massachusetts constitutions. This Court, therefore, must grant review in this case and resolve this conflict.

If this Court re-cements the rule that quasi-judges and quasi-prosecutors are absolutely immune from challenges except when there are criminal circumstances and a total absence of jurisdiction, the decision would not only short-circuit this and any other petitioner's First Amendment

rights, even in the face of "judicial bad behavior," it would also short-circuit the "good behavior" clauses in both the state and federal constitutions. Art, 3, §1, U.S.Const. Art. XXIX, Decl. of Rights, Mass. Const. Part the First.

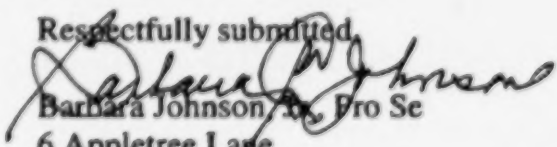
Where quasi-judicial and quasi-prosecutorial immunity and the second prong of the Eleventh Amendment have never been scrutinized and cannot be attributed to the Framers or to any Congress, the application of the judicially-created doctrines of quasi-judicial and quasi-prosecutorial immunity and the unratified second prong of the Eleventh Amendment, must not be continued as *de facto* constitutionalized policies or practices.

Lastly, the second prong of the Eleventh Amendment also unconstitutionally interferes with Petitioner's rights to the full sweep of due process and equal protection of the laws, and her enforceable right to sue the respondents for the deprivation of her constitutional rights. "[L]awyers also enjoy first-class citizenship." *Spevack* , at 516.

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant certiorai to review so that Petitioner may seek the reversal of the application of the *Younger* doctrine, the doctrine of quasi-judicial and quasi-prosecutorial immunity from any source, and the doctrine of the Eleventh Amendment, and the remand of this case to District Court in Boston for trial.

Respectfully submitted,



Barbara Johnson, Jr., Pro Se
6 Appletree Lane
Andover, MA 01810-4102
978-474-0833
Mass. B.B.O. No. 549972
First Circuit Bar No. 36719

23 June 2005

Addendum 1

United States Court Appeals
For the First Circuit

No. 04-1713
04-1833

BARBARA C. JOHNSON,

Plaintiff, Appellant,

v.

BOARD OF BAR OVERSEERS OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Defendants, Appellees.

Before

Torruella, Lipez and Howard,
Circuit Judges.

JUDGMENT

Entered: March 31, 2005

The judgment of the district court is affirmed essentially for the reasons stated in Johnson v. Board of Bar Overseers, 324 F.Supp.2d 276 (D. Mass. 2004). See 1st Cir. R. 27(c). We add only these comments.

Addendum 2

1. The Younger doctrine bars plaintiff's request for declaratory relief. See Samuels v. Mackell, 401 U.S. 66, 72 (1971). "[I]nterference [with pending state proceedings] . . . clearly exists where," as here, "the plaintiff is seeking a declaratory judgment that a prosecution, or the statute serving as its basis, is illegal or unconstitutional." Rio Grande Community Health Ctr. v. Rullan, 397 F.3d 56, 70 (1st Cir. 2005) (emphasis added).

2. Plaintiff fails to distinguish Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982). From the arguments made here, we see no functional difference for Younger purposes between the Massachusetts and New Jersey bar-disciplinary proceedings.

3. For immunity purposes, plaintiff fails to distinguish Bettencourt v. Board of Registration in Medicine, 904 F.2d 772 (1st Cir. 1990). See id. at 782-83 & n.13 (whether functioning as adjudicators or as "'public' prosecutors," members of state medical board have quasi-judicial absolute immunity).

By the Court:

Richard Cushing Donovan, Clerk.

Certified and issued as Mandate
under Fed. R. App. P. 41

Richard Cushing Donovan, Clerk

Deputy Clerk
Dated 4/24/05

By: MARGARET CARTER

Chief Deputy Clerk

Committee v. G

Addendum 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MASSACHUSETTS

BARBARA C. JOHNSON Plaintiff v. BOARD OF BAR OVERSEERS OF MASSACHUSETTS, M. ELLEN CARPENTER, in her individual and professional capacities, HERBERT P. PHILLIPS, in his individual and professional capacities, OFFICE OF BAR COUNSEL, DANIEL CRAIG, in his individual and professional capacities, COMMONWEALTH OF MASSACHUSETTS) Defendants,	)	CIVIL ACTION NO. 03-CV-12314-WGY

JUDGMENT

YOUNG, C. J. **May 27, 2004**

Pursuant to the Memorandum and Order dated May 26, 2004, judgment shall, and hereby does, enter for the Defendants.

By the Court,

Elizabeth Smith
Elizabeth Smith, Deputy Clerk

Approved as to form:

WILLIAM G. YOUNG
CHIEF JUDGE

Addendum 4

Addendum 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MASSACHUSETTS

BARBARA C. JOHNSON Plaintiff v. BOARD OF BAR OVERSEERS OF MASSACHUSETTS, M. ELLEN CARPENTER, in her individual and professional capacities. HERBERT P. PHILLIPS, in his individual and professional capacities, OFFICE OF BAR COUNSEL, DANIEL CRANE, in his individual and professional capacities, COMMONWEALTH OF MASSACHUSETTS Defendants,	)	CIVIL ACTION NO. 03-CV-12314-WGY

MEMORANDUM AND ORDER

YOUNG, C.J. May 26, 2004

I. INTRODUCTION

This case involves a Massachusetts attorney, Barbara C. Johnson, Esq. ("Johnson"), against whom the Massachusetts Office of Bar Counsel has brought disciplinary charges before the Massachusetts Board of Bar Overseers. Johnson filed suit in this Court against the Board of Bar Overseers, the Office of Bar Counsel, the Commonwealth of Massachusetts and various

individuals, alleging that these administrative proceedings have been conducted unfairly and unlawfully. Am. Verified Compl. ("Am. Compl.") [Doc. No. 5]. In her suit, Johnson alleges various violations of her civil rights under 42 U.S.C. §§ 1983 and 1985, and she also alleges defamation under state law. Am. Compl. at 56. She seeks declaratory and injunctive relief as well as money damages. Id. On January 9, 2004, all of the defendants filed a motion to dismiss the Complaint [Doc. No. 6], which this Court granted in part and denied in part in an order from the bench at oral argument on February 24th. On February 25th, the Court clarified its order of the previous day, holding that Johnson's suit for money damages against the individual defendants in their personal capacities stated a cause of action, and inviting the parties to submit further briefing on the issues of quasi-judicial and quasi-prosecutorial immunity. 02/25/04 Order [Doc. No. 14]. In response, the defendants filed a "further motion to dismiss and supporting memorandum" [Doc. No. 15], claiming "absolute immunity," and Johnson filed her opposition to that motion [Doc. No. 18], asserting that neither quasi-judicial nor quasi-prosecutorial immunity is applicable [Doc. No. 17], and a motion for reconsideration of this Court's February 25th order dismissing her claims for declaratory relief ("Pl.'s Mot. for Reconsideration") [Doc. No. 20]. The Court has carefully considered the parties' arguments. This memorandum and

order addresses the remaining claims in this action and sets forth the reasoning underlying the Court's previous orders.

II. BACKGROUND

On January 24, 2003, Massachusetts Bar Counsel Daniel Crane ("Bar Counsel") filed a Petition for Discipline, Ex. to Mot. to Impound [Doc. No. 10] ("Pet.") (copy of the Petition), before the Board of Bar Overseers of the Commonwealth of Massachusetts against Johnson. The Petition contains three counts detailing Johnson's alleged misconduct.

Count I of the Petition alleges that Johnson posted impounded "privileged, confidential and highly personal information" to her website in violation of Mass. Gen. Laws ch. 209C, § 13. Pet. ¶¶ 23-24. Bar Counsel alleges, *inter alia*, that "by disseminating impounded material . . ., failing to return to the juvenile court impounded reports belonging to the court, and failing to remove impounded material from her web site, [Johnson] volated Mass. R. Prof. [C.] 8.4(d) and (h) . . . ." Pet. ¶ 42.

Count II alleges that Johnson charged two clients an excessive fee in violation of Mass. R. Prof. C. 1.5(a), made false, deceptive or misleading representations to them about her fees, time, and charges, in violation of Mass. R. Prof. C. 8.4(c) and (h), commingled her own funds with theirs, and failed to account adequately for her application and disposition of their

retainer in violation of Mass. R. Prof. C. 1.15(a)-(c), 1.16(d), and 8.4(c) and (h). Pet. ¶¶ 95-99.

Count III alleges that Johnson knowingly disobeyed Massachusetts district court orders after those orders were affirmed on appeal, engaged in contempt of court, and refused to pay a judgment of contempt until she had been incarcerated, in violation of Mass. R. Prof. C. 3.4(c) and 8.4(d) and (h). Pet. ¶ 126. Count III further alleges that Johnson filed motions in another action without any legal or factual basis and in bad faith, exposing her client to dismissal of her claims and personal liability for sanctions and damages through Johnson's own misconduct, failed to appeal from the contempt judgment against her client, and pursued a frivolous appeal from an order of the Massachusetts Superior Court, in violation of Canon One, DR 1-102(A)(5) and (6), Canon Six, DR 6-101(A)(1)-(3), and Canon Seven, DR 7-101(A)(3). Pet. ¶¶ 126-27.

Johnson denied all these charges and vigorously defended herself in the proceeding convened by the Board of Bar Overseers. A hearing was scheduled for December 2, 3, 4, 9, 10 and 11, 2003. Am. Compl. ¶ 176. On December 2, during Johnson's opening statement, Assistant Bar Counsel objected to Johnson's mentioning the names of the complainants and various witnesses. Id. ¶ 181. Johnson then attempted to avoid using real names, but when "[a] few times, she slipped," the defendant Phillips, the Special

Hearing Officer presiding over the case, ordered the public out of the hearing room. Id. ¶ 183-86. To protest this decision, Johnson walked out of the hearing room with the last of the public to leave. Id. ¶ 187. Johnson subsequently filed various unsuccessful motions with the Board of Bar Overseers, including motions to dismiss the complaint, for rehearing, for conference with the twelve members of the Board of Bar Overseers, and for reconsideration of the orders denying her prior motions. Id. ¶¶ 189-95. The matter remains pending before the Board of Bar Overseers.

Johnson next brought suit in this Court, seeking declaratory and injunctive relief as well as money damages. Alleging a total of ten causes of action, Johnson brought six Counts seeking declaratory judgments that various rules and procedures of the Board of Bar Overseers are unconstitutional, Id. at 35-49 (Counts 1-6), two Counts for violation of her civil rights under 42 U.S.C. § 1983, Id. at 49-52 (Count 7) and Id. at 53-55 (Count 9), one Count for conspiracy to violate her civil rights under 42 U.S.C. 1985(3), Id. at 52 (Count 8), and one count of defamation under state law, Id. at 55 (Count 10).

Johnson asked this Court to declare (1) that a bar disciplinary proceeding is a quasi-criminal proceeding and that whether or not the proceeding is quasi-criminal, respondents are entitled to a jury trial, (2) that the Rules of the Board of Bar

Overseers are unconstitutional both facially and as applied to civil or quasi-criminal proceedings, (3) that lawyers are entitled to the full sweep of due process and equal protection of all the laws, (4) that Sections 9(1), 9(2), and 9(3) of Supreme Judicial Court Rule 4:01 are unconstitutional both facially and as applied, (5) that Section 10 of Supreme Judicial Court Rule 4:01 is unconstitutional both facially and as applied, and (6) that Rule 1.5 of the Massachusetts Rules of Professional Conduct is unconstitutional on vagueness and overbreadth grounds. Am. Compl. at 1-2; Id. ¶¶ 196-272. Additionally, Johnson seeks money damages from Bar Counsel for making allegedly defamatory statements about her to a reporter that were subsequently published in a local newspaper, as well as money damages from the Board of Bar Overseers for posting on its website that disciplinary proceedings are pending against her. Id. ¶¶ 292-98.

Finally, Johnson alleges violation of her civil rights and conspiracy by the defendants in the prosecution of the disciplinary action against her and seeks fifteen million dollars in compensatory damages plus punitive damages. Id. ¶¶ 273-91.

III. DISCUSSION

Doctrines of abstention, Eleventh Amendment immunity, and judicial and prosecutorial immunity all play a role in the resolution of this case.

Addendum 11

A. Younger Abstention Doctrine

The defendants initially moved to dismiss the enti-recomplaint on the basis of the Younger abstention doctrine. Younger v. Harris, 401 U.S. 37 (1971). Younger requires that federal courts not intervene in ongoing state criminal proceedings. Bettencourt v. Bd. of Registration in Med., 904 F.2d 772, 777 (1st Cir. 1990). Deference is also required to "ongoing, originally state-initiated civil or even administrative proceedings that satisfy three conditions: (1) the proceedings are judicial (as opposed to legislative) in nature; (2) they implicate important state interests; and (3) they provide an adequate opportunity to raise federal constitutional challenges." Id. (footnote omitted).

In Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982), the plaintiff sought to have a federal court declare that certain of the Disciplinary Rules of the Code of Professional Responsibility of New Jersey were vague and overbroad and violated his First Amendment rights. Id. at 429. The Supreme Court granted certiorari to determine whether a federal court should abstain from considering this challenge in light of the fact that state proceedings involving these rules and this party were ongoing. Id. at 425. In ruling that the federal court ought abstain, the Supreme Court noted that "[t]he policies underlying Younger are fully applicable to non-criminal

judicial proceedings when important state interests are involved." Middlesex, 457 U.S. at 432 (citing Moore v. Sims, 442 U.S. 415, 423 (1979), and Huffman v. Pursue, Ltd., 420 U.S. 592, 604-05 (1975)).

To determine whether abstention would apply, the Supreme Court applied the three-part Younger test to New Jersey's disciplinary proceedings, asking: "first, do state bar disciplinary hearings within the . . . jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding[?]; second, do the proceedings implicate important state interests[?]; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges[?]" Middlesex, 457 U.S. at 432.

The Supreme Court held that the first part of the test was met in that it was clear that the New Jersey Supreme Court considered its bar disciplinary proceedings to be "judicial" in nature. Id. at 433-34. The second part of the test was also met in that the state has an "extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." Id. at 434. Finally, the third part of the test was met in that the plaintiff had the opportunity to raise his constitutional claims in the Supreme Court of New Jersey. Id. at 435-36.

Addendum 13

Bar disciplinary proceedings in Massachusetts are similar to those in New Jersey. The Supreme Judicial Court created the Board of Bar Overseers and Office of the Bar Counsel in 1974 as independent administrative bodies to investigate and evaluate complaints against lawyers. Mass. S.J.C. Rule 4:01 (effective September 1, 1974). The Supreme Judicial Court established these entities, "acting in accordance with its power to supervise the conduct of attorneys, and the board exists as the disciplinary arm of [the Supreme Judicial Court]." Binns v. Bd. of Bar Overseers, 369 Mass. 975, 976 (1976). Among its many powers and duties, the Board of Bar Overseers may consider and investigate the conduct of any lawyer within its jurisdiction, appoints a chief bar counsel and one or more hearing committees, and may also appoint a special hearing officer to hear charges of misconduct where the Board determines that a speedy and just disposition would better be accomplished by such appointment.

Mass. S.J.C. Rule 4:01 § 5(3). Bar Counsel "prosecute[s] all disciplinary proceedings before hearing committees, special hearing officer[s], the Board [of Bar Overseers], and [the Supreme Judicial Court]." Mass. S.J.C. Rule 4:01 § 7(3). The hearing committees and special hearing officers "conduct hearings on formal charges of misconduct . . . and may recommend that the matter be concluded by dismissal, admonition, public reprimand, suspension, or disbarment." Mass. S.J.C. Rule 4:01 § 6(3).

The attorney disciplinary procedure in Massachusetts thus meets the first test that the proceedings be "judicial in nature." Middlesex, 457 U.S. at 433.

The second part of the test is also met in that Massachusetts, like New Jersey, has an "extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." Id. at 434.

The third requirement for abstention principles to apply is that the state disciplinary proceeding must afford plaintiffs an adequate opportunity to raise constitutional challenges. Id. at 432. The review of a hearing committee's (or special hearing officer's) report is first to the Board, next to a single justice of the Supreme Judicial Court, and the decision of the single justice may be appealed to the full bench of the Supreme Judicial Court. Mass. S.J.C. Rule 4:01 § 8(4). The rules direct that the "Board shall review, and may revise, the findings of fact, conclusions of law and recommendation of the hearing committee, special hearing officer, or hearing panel" in a disciplinary action. Id. (emphasis added).

The Supreme Judicial Court recently summarized its standard of review as follows:

> Our general standard of review when a disciplinary sanction imposed by a single justice is challenged is whether the sanction "is markedly disparate from judgments in comparable cases." But where the case is unique or involves a matter

> of first impression and is therefore not comparable to previous cases, we "review the decision of the single justice to determine whether it is supported by sufficient evidence, constitutes an abuse of discretion, and is free from any error of law." In either instance, our review of the single justice's decision is de novo, but tempered with substantial deference to the board's recommendation.

Matter of Foley, 439 Mass. 324, 333 (2003) (citations omitted).

The Massachusetts Supreme Judicial Court acknowledges that an attorney, such as Johnson, has a "constitutionally protected interest in [her] license to practice law and that [she] must be afforded due process of law before [she] can be deprived of that interest." Matter of Kenney, 399 Mass. 431, 435 (1987). In Kenney, the respondent attorney raised Fifth and Fourteenth Amendment claims that were given full consideration by the Supreme Judicial Court. Indeed, "it cannot be doubted that the courts of the Commonwealth . . . will give federal constitutional issues . . . the closest scrutiny." Bd. of Locomotive Eng'rs v. Massachusetts Comm'n Against Discrimination, 695 F. Supp. 1321, 1323 (D. Mass. 1988). Massachusetts law expressly guarantees to any aggrieved party the right of judicial review of administrative decisions, with the reviewing court having the power, *inter alia*, to modify them or to set them aside if they are issued:

(a) In violation of constitutional provisions; or
(b) In excess of the statutory authority or jurisdiction ofthe agency; or
(c) Based upon an error of law; or

(d) Made upon unlawful procedure; or
(e) Unsupported by substantial evidence; or
(f) Unwarranted by facts found by the court on the record as submitted . . .; or
(g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

Mass. Gen. Laws ch. 30A, § 14(7). Since Johnson will have an opportunity to raise her constitutional claims in the courts of the Commonwealth, the third and final requirement of Younger is met.

Nonetheless, even where, as here, all three requirements of Younger are satisfied, "a federal court may nonetheless intervene to halt a an ongoing state judicial proceeding if the plaintiff demonstrates 'bad faith, harassment, or any other unusual circumstance.'" Brooks v. New Hampshire Supreme Court, 80 F.3d 633, 639 (1st Cir. 1996) (quoting Younger, 401 U.S. at 54). To invoke the "bias" exception to the Younger abstention doctrine, Brooks first requires a plaintiff to seek to recuse allegedly biased judges in the state proceeding. Id. at 640; see also Middlesex, 457 U.S. at 435; Bettencourt, 904 F.2d at 780; Standard Alaska Prod. Co. v. Schaible, 874 F.2d 624, 629 (9th Cir. 1989). Unlike Brooks, who did not seek the recusal of any allegedly biased judge, Johnson has sought recusal of the Special Hearing Officer, the Board Chair, and Bar Counsel. Pl.'s Mem. Opp'n [Doc. No. 9] at 13. Thus, she meets this first requirement.

Second, Johnson must offer "some evidence that abstention will jeopardize [her] due process right to an impartial adjudication." Brooks, 80 F.3d at 640. "To implicate due process, claims of general institutional bias must be harnessed to a further showing, such as a potential conflict of interest, or a pecuniary stake in the outcome of the litigation." Id. (internal citations omitted). In her attempt to meet this burden, Johnson offers a "further showing" of "her crusade for court reform and the abolition of judicial and quasi-judicial immunity." Pl.'s Mem. Opp'n at 14. She claims that her "views on the need for judicial accountability and the need for court reform are well-known to the courts," that the Board of Bar Overseers and Office of Bar Counsel are "offspring of the SJC," that Board of Bar Overseers Chair Carpenter's "colleague and former partner is sitting on the SJC bench that appointed her to the Board," and that appeal would be "futile" based on her past experience bringing "a few cases to the SJC," where the Supreme Judicial Court made "what Johnson perceived to be unconscionable decisions in those few cases." Am. Compl. ¶ 111. She also alleges that the ulterior motive of Bar Counsel is to censor her website, and thereby to interfere with her exercise of her "First Amendment right to political speech and free expression, as well as her right and obligation to see that justice is done." Am. Compl. ¶ 46. Despite these numerous conclusory allegations,

Johnson offers no concrete evidence that the Office of Bar Counsel, the Board of Bar Overseers, the Supreme Judicial Court, or any of the individual defendants stand to gain or lose anything or have any particularized interest that might tend to undermine their impartiality. See Brooks, 80 F.3d at 640. Therefore, the bias exception to Younger does not apply.

Since "Younger contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts," Gibson v. Berryhill, 411 U.S. 564, 577 (1973), this Court dismissed Johnson's claims for declaratory relief. Having done so, Johnson's sole appeal from an unfavorable state court decision will be to the United States Supreme Court, since "[i]t is well-established that lower federal courts have no jurisdiction to hear appeals from state court decisions, even if the state judgment is challenged as unconstitutional." Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 628 (1st Cir. 1990). See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923). See also 28 U.S.C. § 1257.

Johnson, however, argues that District of Columbia Court of Appeals v. Feldman should permit her to attack the validity of the Board of Bar Overseers rules in this Court. Pl.'s Mot. for Reconsideration. Her reliance on Feldman is misplaced, however.

The Supreme Court in Feldman addressed the so-called Rooker doctrine in a challenge to rules and regulations governing bar admission policies. Feldman, 460 U.S. at 468. "The Court carefully distinguished between 'general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings' — for which there is jurisdiction in the lower federal courts — and 'challenges to state-court decisions in particular cases arising out of judicial proceedings,' — for which there is not." Schneider, 917 F.2d at 628 (quoting Feldman, 460 U.S. at 486).

Were Johnson not engaged in state administrative proceedings involving the same rules as those cited in her complaint, Feldman might well permit her to challenge the constitutionality of those rules in federal court. See Maymó-Meléndez v. Álvarez-Ramírez, 364 F.3d 27, 34 (1st Cir. 2004) ("Rooker-Feldman does not insulate from federal challenge administrative rulings standing alone." (citing Van Harken v. City of Chicago, 103 F.3d 1346, 1349 (7th Cir. 1997)) (emphasis in original). Since Johnson's challenge emanates from the proceeding currently underway in the Massachusetts Board of Bar Overseers, however, Younger requires abstention on her claims for declaratory and equitable relief.

Moreover, "once a state judicial proceeding [has] begun," Younger requires the "exhaustion of state judicial remedies" even though a final state court judgment would likely preclude any new

federal lawsuit. Maymó-Meléndez, 364 F.3d at 34-35 (citing Huffman, 420 U.S. at 607-11).

The Younger abstention doctrine does not apply, however, to Johnson's claims for money damages pursuant to Section 1983 or Section 1985, or to her defamation claim, since she will not have the opportunity to make these claims in the state proceeding. See Deakins v. Monaghan, 484 U.S. 193, 202 (1988) (stating that even if the Younger abstention applies, the district court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding). Thus, while declaratory judgment Counts 1 through 6 were dismissed in toto in reliance on Younger, the civil rights Counts 7 through 9 were dismissed under Younger only to the extent that Johnson sought equitable relief.

B. Eleventh Amendment Immunity

It is settled law "that neither a state agency nor a state official acting in his official capacity may be sued for damages in a section 1983 action." Wang v. New Hampshire Bd. of Reg. in Med., 55 F.3d 698, 700 (1st Cir. 1995) (quoting Johnson v. Rodriguez, 943 F.2d 104, 108 (1st Cir. 1991)) (internal quotations omitted). Eleventh Amendment immunity applies to all claims for money damages against the state entities here, as well as to their employees to the extent that the employees were sued

in their official capacities. Kentucky v. Graham, 473 U.S. 159, 169 (1985). The Board of Bar Overseers and the Office of Bar Counsel are both entities created by court rule to support the operation of the Courts of Massachusetts through regulation of the Bar. As such, they are arms of the state, subject to the Eleventh Amendment bar against suits for money damages in federal court. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). The individuals named are also immune from suit based on their actions taken in their official capacities. Bettencourt, 904 F.2d at 781.

"A State may waive its sovereign immunity by consenting to be sued in federal court." Maysonet-Robles v. Cabrero, 323 F.3d 43, 49 (1st Cir. 2003) (citing College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 670 (1999)). Such waivers, however, must be unequivocal. College Savings Bank, 527 U.S. at 675. There being no such waiver here, the Court dismissed Counts 7 through 9 to the extent that they sought money damages against the Commonwealth of Massachusetts, the Board of Bar Overseers, the Office of Bar Counsel, and the individual defendants sued for actions taken in their official capacities.

C. Quasi-Judicial and Quasi-Prosecutorial Immunity

At this point, the only defendants remaining are Board Chair Carpenter, Special Hearing Officer Phillips, and Bar Counsel Crane in their individual capacities. The only federal claims remaining are Counts 7 through 9, and only to the extent that Johnson seeks money damages against these persons in their individual capacities. These defendants are, however, entitled to absolute immunity for acts committed within the scope of their responsibilities.

In Bettencourt v. Board of Registration in Medicine, 904 F.2d 772 (1st Cir. 1990), the court explained that "there are some officials whose special functions require a full exemption from liability." Id. at 782 (quoting Butz v. Economou, 438 U.S. 478, 508 (1977)) (internal quotation marks omitted). "Such officials include, among others, judges performing judicial acts within their jurisdiction, prosecutors performing acts intimately associated with the judicial phase of the criminal process, and certain 'quasi-judicial' agency officials who, irrespective of their title, perform functions essentially similar to those of judges or prosecutors, in a setting similar to that of a court." Bettencourt, 904 F.2d at 782 (emphasis in original) (internal citations and quotation marks omitted). Bettencourt involved a civil rights action brought by a physician whose medical license had been revoked by the Board of Registration in Medicine.

After dismissing the non-monetary claims on Younger grounds, the Court

determined whether the Board members were entitled to absolute judicial immunity by applying a three-part test:

> First, does a Board member, like a judge, perform a traditional "adjudicatory" function, in that he decides facts, applies law, and otherwise resolves disputes on the merits (free from direct political influence)? Second, does a Board member, like a judge, decide cases sufficiently controversial that, in the absence of absolute immunity, he would be subject to numerous damages actions? Third, does a Board member, like a judge, adjudicate disputes against a backdrop of multiple safeguards designed to protect a physician's constitutional rights?

Bettencourt, 904 F.2d at 783. The Court held that the Board members, in deciding to revoke Bettencourt's license, were acting in their adjudicative rather than legislative capacities and, having met the other requirements, were entitled to absolute quasi-judicial immunity for these actions. Id. at 784.

The situation of Board Chair Carpenter and Special Hearing Officer Phillips is analogous to that of the Board members in Bettencourt. First, these defendants are performing a traditional adjudicatory function by determining whether to recommend Johnson for disciplinary sanctions after making factual and legal determinations, thereby meeting the first requirement.

Second, the act of recommending that an attorney be disciplined is "likely to stimulate a litigious reaction from the disappointed [attorney], making the need for absolute immunity apparent." Id. at 783. Third, as described earlier, multiple levels of review exist, up to and including review by the full

Supreme Judicial Court. Moreover, Johnson makes no allegations of conduct of these defendants outside their adjudicators of her case. Therefore, as did the First Circuit in Bettencourt, this Court "hold[s] that absolute immunity bars [Johnson's] claims for damages against the Board members acting in their 'quasi-judicial' capacities." Id. at 784.

Defendant Crane, however, is not acting in an adjudicative role; his role is prosecutorial in nature. As Bar Counsel, he "prosecute[s] all disciplinary proceedings before hearing committees, special hearing officer[s], the Board [of Bar Overseers], and [the Supreme Judicial Court]." Rule 4:01 § 7(3).

Like adjudicators, prosecutors enjoy absolute immunity against damages actions under Section 1983 for activities in their quasijudicial capacity, Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976), and "[s]tate officials performing prosecutorial functions -- including their decisions to initiate administrative proceedings aimed at legal sanctions -- are entitled to absolute immunity as well," Wang, 55 F.3d at 701. Crane is, therefore, entitled to absolute immunity based on his role as prosecutor in the Board of Bar Overseers action against Johnson, and the Court dismisses Counts 7 through 9.

With all federal claims dismissed, the Court exercises its discretion to refrain from exercising supplemental jurisdiction over Johnson's remaining claim for defamation.

IV. CONCLUSIONS

For the reasons stated above, Counts 1 through 6, for declaratory and injunctive relief, and Counts 7 through 9, insofar as they sought injunctive or declaratory relief, were dismissed on the basis of the Younger abstention doctrine.

Counts 7 through 9, insofar as they sought money damages, were dismissed as to the defendants Board of Bar Overseers, Commonwealth of Massachusetts, Office of Bar Counsel, and named individuals acting in their professional capacities pursuant to their Eleventh Amendment immunity from suit. Counts 7 through 9, seeking money damages based on the actions of Defendants M. Ellen Carpenter, Herbert P. Phillips, and Daniel Crane in their individual capacities are hereby dismissed on the basis of those defendants' absolute immunity arising from their quasi-judicial and quasi-prosecutorial roles in the Board of Bar Overseers and the Office of Bar Counsel. Thus, Counts 1 through 9 have been dismissed with prejudice.

As to Count 10, the state law claim for defamation against the Board of Bar Overseers and Bar Counsel Crane, the Court declines to exercise supplemental jurisdiction and dismisses this Count without prejudice. As a result, the Motions to Dismiss [Doc. Nos. 6, 15] have been ALLOWED in full.

Finally, the Court DENIES Johnson's Motion for Reconsideration of the January 25, 2004 Order [Doc. No. 20].

As there are no remaining claims or defendants, this action is hereby DISMISSED.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
CHIEF JUDGE

The date January 25, 2004, shown on line 2 above, is a clerical error in the court order of May 26, 2004 [Paper 21]. The May 26th order (above) references Paper 20. Paper 20 is Petitioner's Motion for Reconsideration of Paper 14, which is the court order of February 25, 2004.

02/24/2004		ELECTRONIC Clerk's Notes for proceedings held before Judge William G. Young at Boston University Law School: Motion Hearing held on 2/24/2004 re 6 MOTION to Dismiss filed by M. Ellen Carpenter, Herbert Phillips, Commonwealth of Massachusetts, Board of Bar Overseers of Massachusetts, Office of Bar Counsel, Daniel Crane. After hearing the Court Allows the motion to Dismiss in part and Takes Under Advisement the motion to dismiss in part. (Court Reporter WOMACK.) (Smith, Bonnie) (Entered: 02/25/2004)
02/25/2004	14	Judge William G. Young : ORDER entered. The Court accords all parties twenty days to brief the issue. Briefs shall be submitted on or before 3/17/04. In all other respects, the Court's February 24, 2004 ruling is undisturbed. See Document #14. cc/cl.(Bell, Marie) (Entered: 02/26/2004)
03/18/2004	20	MOTION for Reconsideration re Motion Hearing,, 14 Order, re dismissal of Counts 1-6, which seek declaratory judgments by Barbara C. Johnson.(Johnson, Barbara) (Entered: 03/18/2004)
05/26/2004	21	Judge William G. Young : MEMORANDUM AND ORDER entered. cc/cl.(Bell, Marie) (Entered: 05/26/2004)

Addendum 27

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BARBARA C. JOHNSON, Plaintiff, v. BOARD OF BAR OVERSEERS OF MASSACHUSETTS, M. ELLEN CARPENTER, in her individual and professional capacities, HERBERT P. PHILLIPS, in his individual and professional capacities, OFFICE OF BAR COUNSEL, DANIEL CRANE, in his individual and professional capacities, COMMONWEALTH OF MASSACHUSETTS, Defendants.	)	CIVIL ACTION NO. 03-12314-WGY

ORDER

YOUNG, C.J. February 25, 2004

Upon further reflection, the Court notes that its February 24, 2004 order from the bench failed to dispose of certain of the Plaintiff's claims. In particular, Claims 7 through 9, insofar as they seek money damages against Defendants Carpenter, Phillips, and Crane in their individual capacities, are not barred by Eleventh Amendment immunity. These are federal civil rights claims that fall squarely within this Court's subject matter jurisdiction.

While it would appear that these defendants may be absolutely immune from liability under the respective doctrines of quasi-judicial and quasi-prosecutorial immunity, neither party has briefed nor raised these defenses.

The Court, therefore, accords all parties twenty days to brief the issue, shouold they choose to do so. Briefs shall be submitted on or before March 17, 2004. In all other respects, the court's February 24, 2004 ruling is undisturbed.

SO ORDERED.

WILLIAM G. YOUNG
CHIEF JUDGE

Subject: Activity in Case 1:03-cv-12314-WGY Johnson v. Board of Bar Overseers of Massachusetts et al "Motion Hearing"
Date: Wed, 25 Feb 2004 14:48:01 -0500 (EST)
From: ECFnotice@mad.uscourts.gov
To: CourtCopy@mad.uscourts.gov -

NOTE TO PUBLIC ACCESS USERS You may view the filed documents once without charge. To avoid later charges, download a copy of each document during this first viewing.

United States District Court
District of Massachusetts

Notice of Electronic Filing
The following transaction was received from Smith, Bonnie entered on 2/25/2004 at 2:48 PM EST and filed on 2/24/2004

Case Name: Johnson v. Board of Bar Overseers of Massachusetts et al
Case Number: 1:03-cv-12314
https://ecf.mad.uscourts.gov/cgi-bin/DktRpt.pl?89274

Document Number:
Copy the URL address on the line below into the location bar of your Web browser to view the document:

Docket Text:
ELECTRONIC Clerk's Notes for proceedings held before Judge William G. Young at Boston University Law School: Motion Hearing held on 2/24/2004 re [6] MOTION to Dismiss filed by M. Ellen Carpenter, Herbert Phillips,

Addendum 30

Commonwealth of Massachusetts, Board of Bar Overseers of Massachusetts, Office of Bar Counsel, Daniel Crane. After hearing the Court Allows the motion to Dismiss in part and Takes Under Advisement the motion to dismiss in part. (Court Reporter WOMACK.) (Smith, Bonnie)

The following document(s) are associated with this transaction:

1:03-cv-12314 Notice will be electronically mailed to:
John R. Hitt
john.hitt@ago.state.ma.us

Barbara C. Johnson
barbaracjohnson@att.net

1:03-cv-12314 Notice will not be electronically mailed to: